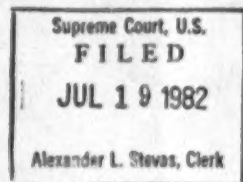


IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

82-5093



MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

PETITION FOR WRIT OF CERTIORARI

Counsel for Petitioner
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(ii) the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance or . . .

(iv) at the time of the commission of the capital felony, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired.

STATEMENT OF THE CASE

Procedural Posture

On May 13, 1978, Margaret K. Hand was murdered in Nassawadox, in Northampton County, Virginia. According to the coroner's report, her assailant had hit her twice with an ax, once in the head and once in the side; the chair in which she was lying was then set afire. On May 15, 1978, Petitioner Morris Mason was arrested in connection with the murder of Mrs. Hand and attacks on two other women. Petitioner gave statements to the sheriff's deputies, stating that he had raped and then murdered Mrs. Hand. The coroner's report showed no evidence of spermatazoa or semen. Mr. Mason was then charged with capital murder-- murder in the commission of a rape -- in connection with the death of Mrs. Hand, and counsel was appointed to represent him. On September 28, 1978, Petitioner pled guilty in the Circuit Court for the County of Northampton, the Honorable N. Wescott Jacob, presiding, to the charge of capital murder-- murder in the course of a rape. On September 29, 1978, the trial court held the sentencing phase of the bifurcated capital trial; on October 10, 1978, the post-sentence report having been completed and received into evidence, the trial court imposed a sentence of death.

Petitioner appealed his conviction and death sentence to the Virginia Supreme Court, which affirmed the judgment in Mason v. Commonwealth, 219 Va. 1091 (1979). This Court denied Petitioner's Petition for a Writ of Certiorari. 444 U.S. 919 (1979).

QUESTIONS PRESENTED

1. Was the representation afforded Petitioner by trial counsel within the range of competence demanded of attorneys in criminal cases?

2. Did the trial court rule correctly in imposing the burden on Petitioner to establish prejudice from the errors and omissions of counsel?

3. If Petitioner did bear the burden of establishing prejudice by a preponderance of the evidence, did Petitioner meet that burden?

TABLE OF CONTENTS

QUESTIONS PRESENTED	
TABLE OF CONTENTS	
TABLE OF AUTHORITIES	
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATUTES INVOLVED	1
STATEMENT OF CASE	2
ARGUMENT I	8
CONCLUSION	23
MAILING CERTIFICATE	24
TABLE OF CONTENTS OF APPENDIX	26

TABLE OF AUTHORITIES

Cases

<u>Betts v. Brady</u> , 316 U.S. 455 (1942)	14
<u>Blake v. Zant</u> , 513 F.Supp. 772 (S.D.Ga. 1981)	11
<u>Brennan v. Blankenship</u> , 472 F.Supp. 149 (W.D.Va. 1979)	12
<u>Brooks v. Texas</u> , 381 F.2d 619 (5th Cir. 1967)	12
<u>Chapman v. California</u> , 386 U.S. 18 (1967)	14, 15, 18
<u>Coles v. Peyton</u> , 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S.849 (1968)	11
<u>Cuyler v. Sullivan</u> , 446 U.S. 335 (1980)	15
<u>Davis v. Alabama</u> , 596 F.2d 1214 (5th Cir. 1979), vacated as moot 446 U.S. 903 (1980)	11
<u>Geders v. United States</u> , 425 U.S. 80 (1976)	16
<u>Glasser v. United States</u> , 315 U.S. 60 (1945)	15
<u>Herring v. New York</u> , 422 U.S. 853 (1975)	16
<u>Holloway v. Arkansas</u> , 435 U.S. 475 (1978)	14, 15, 16
<u>In re Saunders</u> , 2 Cal3d 1033, 88 Cal.Rptr. 633, 472 P.2d 921 (1970)	12
<u>Knight v. State</u> , 394 So.2d 997 (Fla. 1981)	11
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	10, 20
<u>Marzullo v. Maryland</u> , 561 F.2d 540 (4th Cir. 1977); cert. denied 435 U.S. 1011 (1978)	8, 10
<u>Mason v. Commonwealth</u> , 219 Va. 1091 (1979)	2
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970)	8, 24
<u>McQueen v. Swenson</u> , 498 F.2d 207 (8th Cir. 1974)	18
<u>Slayton v. Weinberger</u> , 213 Va. 690 (1973)	14
<u>Springer v. Collins</u> , 444 F.Supp 1049 (D.Md. 1977)	12
<u>Stephens v. Zant</u> , 631 F.2d 397 (5th Cir. 1980), amended on rehearing, 648 F.2d 446 (5th Cir. 1981), question certified to Supreme Court of Georgia, ___ U.S. ___ 72 L.Ed.2d 272 (1982)	19
<u>United States ex rel. Johnson v. Johnson</u> , 531 F.2d 169 (3rd Cir.) cert. denied, 425 U.S. 997 (1976)	18
<u>Voyles v. Watkins</u> , 489 F.Supp. 901 (N.D.Miss. 1980)	11

Washington v. Strickland, 673 F.2d 879 (1982), 10, 11, 18
rehearing en banc granted, ___ F.2d ___
(5th Cir. May 14, 1982)

Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978) 12, 14

Other Authorities:

28 U.S.C. §1257(3)	1
Va. Code Ann. §19.2-264.4 (Cum. Supp. 1977)	1
Va. Code Ann. §19.2-264.4(B)	4, 11

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), in that Petitioner claims that his conviction violated the Sixth and Fourteenth Amendments of the United States Constitution. The order of which review is sought is the order denying Petitioner's Petition for Appeal in the Virginia Supreme Court, dated April 20, 1982.

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this Petition for Writ of Certiorari are the following:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI

All person born or naturalized in the United States . . . are citizens of the United States of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

U.S. CONST. AMEND. XIV.

STATUTES INVOLVED

The statutory provision involved here is Va. Code Ann.

§19.2-264.4 (Cum. Supp. 1977):

A. Upon a finding that the Defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the Defendant shall be sentenced to death or life imprisonment . . .

B. . . . Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the Defendant, and any other fact in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: . . .

On January 2, 1980, Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court for the County of Northampton. In this Petition, Petitioner alleged, inter alia, that he was denied the effective assistance of counsel at and in connection with the sentencing phase of his capital trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. A copy of that passage of the Petition is appended to this Petition for Writ of Certiorari. The court granted Petitioner's request for a plenary hearing on his claim that his trial counsel had been ineffective; all other claims were denied by order entered on April 8, 1980. The plenary hearing was held on April 25, 1980. Throughout this Petition for Writ of Certiorari the transcript of this hearing will be cited as (T. __).

In the court's written Findings of Fact and Conclusions of Law, entered on March 17, 1981, the court denied Petitioner's claim of ineffective assistance of counsel. The court's final order was entered on April 15, 1981, to which Petitioner objected. Copies of the Findings of Fact and Conclusions of Law and the order are appended to this Petition. Petitioner timely filed his Petition for Appeal with the Virginia Supreme Court, which was denied by order dated April 20, 1982. A copy of that order is appended to this Petition.

Psychiatric Examination

One of Petitioner's trial counsel, Henry P. Custis, testified that the nature of the crimes, Mr. Mason's statements to them, and his behavior in confessing on a lie-detector test to two more capital murders led them to suspect that Mr. Mason might have a psychiatric defense in exculpation or mitigation. (T. 51, 55, 57).

On May 22, 1978, the General District Court for Northampton County ordered that Petitioner be evaluated by Dr. W.

A. Dietzgen, of the Eastern Shore Mental Health Center; in a report dated May 26, 1978, Dr. Dietzgen stated that, in his opinion, Petitioner was competent to stand trial.

At the request of defense counsel, Petitioner was admitted to Central State Hospital on May 30, 1978, to evaluate only "his competence to stand trial and sanity at the time of the alleged offenses."

At no time was the staff at Central State Hospital specifically directed by the court or requested by defense counsel or the Commonwealth's Attorney to examine Mr. Mason for the presence of mitigating mental abnormality as defined in Va. Code Ann. §19.2-264.4(B) (ii) and (iv). T. 9, 45).

At no time during Mr. Mason's commitment in 1978 did the psychiatrists at Central State Hospital ever conduct an evaluation of Mr. Mason that would have enabled them to give an opinion as to the presence of mitigating mental abnormality. (T. 9, 38). Both Dr. Dimitris and Dr. William M. Lee, the forensic psychiatrist and psychologist, respectively, who examined Mr. Mason, testified that the examinations conducted during Mr. Mason's commitment in 1978 were insufficient to enable them to form any opinion as to the presence of mitigating mental abnormality. (T. 15-16, 29, 35-36, 106).

During Mr. Mason's commitment to Central State Hospital in May, 1978, he denied any wrongdoing in his discussions of the crimes with the staff (T. 10, 107), even though he had previously given numerous statements to police officers and jailers implicating himself in the capital offense. The Central State staff were not aware of these statements, and did not have copies of them during Mr. Mason's hospitalization. (T. 10).

Both Dr. Dimitris and Dr. Lee testified that the detailed examination necessary to assess mitigating mental abnormality requires an opportunity to discuss the details of the offense with the defendant and to confront him with any prior

confessions. (T. 10, 12-13, 108, 115).

On June 27, 1978, Dr. Dimitris wrote to General District Court Judge Willis, asking for additional information, including copies of statements by Mr. Mason and statements from the jailers and others who had observed Mr. Mason between the time of the offense and the time, some two weeks later, when he arrived at Central State Hospital.

Petitioner left Central State Hospital on July 11, 1978, to return to jail to await trial. Thus, when copies of the statements finally came to Dr. Dimitris on August 15, 1978, Petitioner was no longer at Central State Hospital, and the staff was unable to question Petitioner about the statements. Both Dr. Dimitris and Dr. Lee testified that an informed clinical opinion concerning mitigating mental abnormality, as distinguished from "legal insanity," could not have been based on a review of the statements, standing alone, without an opportunity to question Mr. Mason in person; it is the process of confrontation itself that is valuable for clinical analysis (T. 134). These answers were not made in the abstract; at the hearing, the Commonwealth introduced a videotape of a news interview with Petitioner, filmed immediately after the sentence of death was handed down. That was the first time that Dr. Dimitris had seen Petitioner discuss the crimes. Dr. Dimitris testified that his viewing of the videotape raised serious questions in his mind about "inappropriate affect" and about Mr. Mason's reported drug consumption, questions that he had not previously had occasion to ask Mr. Mason. (T. 126, 134).

Mr. Custis testified that he had told Mr. Mason to cooperate fully with Dr. Dimitris and Dr. Lee (T. 41); he indicated that he believed that Mr. Mason had told him that he had cooperated fully, though Mr. Custis was not sure (T. 42). Mr. Custis further testified that he had not been aware during the

time when he was representing Mr. Mason that his client had not in fact cooperated with Dr. Dimitris and Dr. Lee. (T. 66). He testified that, had he known that his client had not cooperated, he would have requested another examination. (T. 61, 65).

On August 23, 1978, Dr. Dimitris wrote a letter to the court, stating that, in his opinion, Mr. Mason was competent to stand trial and that he had been sane at the time the offense had been committed. Mr. Custis testified that he had read the reports that Dr. Dimitris had filed with the court, that he had sent for a copy of the full hospital record, and that he had read that record. (T. 83).

Mr. Mason's Central State record includes numerous interview notes and staff conference summaries which state that Mr. Mason denied any involvement in the capital offense with which he was charged. (Petitioner's Exhibit 1). With the exception of a letter from Mr. Custis to Dr. Dimitris requesting a copy of the Central State record, neither Dr. Custis nor his colleagues ever communicated directly with Dr. Dimitris or Dr. Lee; they never discussed the doctors' examination or findings with them. (T. 13, 17, 42, 44).

Mr. Custis testified that he was not knowledgeable about the procedures used by forensic psychiatrists, and that he did not know what information they would need to formulate their opinions. (T. 57).

Mr. Custis testified that he and his colleagues did not believe Dr. Dimitris could be helpful because Dr. Dimitris' report to the court had been negative on the question of legal insanity. (T. 45).

Mr. Custis testified that he and his colleagues obtained the discharge summaries from the Veterans' Administration hospitals in Northport, New York, and Coatesville, Pennsylvania, indicating that Mr. Mason was a paranoid schizophrenic; however, they did not attempt to obtain the

detailed records themselves. At the capital sentencing phase of Petitioner's trial, they introduced into evidence only the discharge summaries. (T. 46).

The Trial

On September 28, 1978, Petitioner pled guilty to capital murder, against the advice of counsel. On September 29, 1978, the sentencing hearing was held, at which the only evidence consisted of the report of Dr. Dietzgen, the two reports from Dr. Dimitris, a copy of the 1972 order civilly committing Petitioner to Eastern State Hospital, and the summary of the record of Petitioner's hospitalizations in the Veterans' Administration Hospitals in Northport, New York, and Coatesville, Pennsylvania, in 1974. No psychiatric testimony was introduced. At that time, the trial court indicated that it expected to impose the death penalty; however, imposition of sentence was delayed until a post-sentence report could be completed.

On October 10, 1978, the post-sentence report had been completed and was received into evidence. Between September 29 and October 10, Mr. Custis and co-counsel Mr. Phillips made no further efforts to develop any mitigating evidence. On October 10, 1978, the trial court imposed the sentence of death.

The First Complete Examination

After the plenary hearing on April 25, 1980, when it had become apparent that Petitioner had never been examined for mitigating mental abnormality, counsel for both sides requested that Petitioner be examined by Dr. Dimitris, to determine whether any such evidence existed. The order requiring the examination was entered on May 14, 1980. Dr. Dimitris responded by letter dated July 14, 1980. Dr. Dimitris' letter gave a bifurcated opinion; Dr. Dimitris could not determine whether the statements given to Investigator K. E. Collins by Petitioner were true (in which case no mitigating mental abnormalities would have been

present) or whether Mr. Mason's statements to the examiners at Central State Hospital were true (in which case mitigating mental abnormalities certainly would have been present). Unable to resolve this factual question, Dr. Dimitris could not give an authoritative answer.

Petitioner then moved the court to allow him to be examined while under the influence of sodium amytal, so that Dr. Dimitris might be able to resolve this factual inconsistency. By order entered December 8, 1980, to which the Petitioner objected, the request was denied.

ARGUMENT I

THE TRIAL COURT ERRED IN RULING THAT PETITIONER HAD NOT BEEN DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL.

This Court has held, in McMann v. Richardson, 397 U.S. 759, 770-71 (1970), that the proper test for determining whether counsel was ineffective is whether counsel's assistance "was within the range of competence demanded of attorneys in criminal cases." The trial court employed the McMann test, as refined by the Fourth Circuit in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977); cert. denied 435 U.S. 1011 (1978).

A. Petitioner's Evidence Shows That His Trial Attorneys Failed to Explore, Develop and Present Available Evidence of Mitigating Mental Abnormality And Therefore Establishes a Prima Facie Case of Ineffective Assistance of Counsel, in Violation Of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's evidence showed that counsel failed to explore, develop, and prepare available evidence of mitigating mental abnormality.

The various errors and omissions of counsel are spelled out in great detail in the Statement of Facts, and will only be summarized here, as follows:

1. Although counsel stated that they knew that Morris Mason's sole hope was to find a mitigating mental abnormality,

and although counsel knew that Mr. Mason had been diagnosed as a paranoid schizophrenic in the past, had been under psychiatric care previously, and had committed bizarre crimes, counsel never sought to have Petitioner examined for mitigating mental abnormality. The examiners were not requested to conduct such an evaluation, and they did not do so. The examination which they did conduct did not, and could not, provide an adequate clinical predicate for an opinion on mitigating mental abnormality. When defense counsel read the report submitted by Dr. Dimitris, noted that there was no mention of the presence or absence of mitigating mental abnormality, and yet they still failed to contact the examiners or to ask the court for a further examination of Mr. Mason on these issues. Although defense counsel subsequently (on September 13, 1978) renewed their request for an independent examination, the request was again limited to the issues of legal sanity and competency to stand trial.

The inescapable conclusion is that counsel did not understand the concept of mitigating mental abnormality, or at least did not understand its legal significance.

2. At no time did defense counsel ever contact the psychiatrists, in whose assistance they professed to be so interested, to discuss the evaluation or to ascertain the specific bases for the opinions rendered in the report to the court. The critical significance of this omission is apparent in the record; a simple telephone call would have disclosed

- a. that Mr. Mason had denied his involvement in the capital murder; and
- b. that the examiners could not formulate any opinion concerning the presence or absence of mitigating mental abnormality without Mr. Mason's cooperation, his candid discussion of the crimes themselves, and an opportunity to confront him with his earlier statements to the sheriffs.

3. This critical omission could have been rectified if

counsel had subsequently realized the restricted scope of the Central State evaluation. This opportunity was presented when counsel received a copy of the Central State Hospital record since Mr. Mason's non-cooperation was fully apparent on the face of those records. The court must therefore infer either that counsel failed to read the records or that counsel failed, incompetently, to realize the critical significance of the information contained therein.

4. The evidence presented at the capital sentencing phase of Petitioner's trial was so meager and so bereft of any development or explanation as to be worthless.

Counsel's omissions were of critical magnitude in the context of Petitioner's case, and they establish a prima facie case of a denial of his right to the effective assistance of counsel.

The issue of ineffective assistance of counsel, under the McMann standard, is best discussed by asking this question: What would have reasonably informed and prepared defense counsel have done on behalf of their client in this case? It is important to note that the standard depends on the circumstances of the individual case:

The normal competency standard is necessarily broad and flexible because it is designed to encompass many different factual situations and circumstances.

Marzullo v. Maryland, 561 F.2d at 544. See also Washington v. Strickland, 673 F.2d 879 (1982), rehearing en banc granted, ___ F.2d ___ (5th Cir. May 14, 1982).

One overriding circumstance to be considered is the fact that this is a capital case. Because the stakes are higher in a capital case than in any other criminal case, counsel's actions might well determine whether his client lives or dies. Because of the "qualitative difference between death and other penalties" Lockett v. Ohio, 438 U.S. 586, 604 (1978), counsel

must, as Mr. Custis noted, "pull out all the stops." (T. 68). The range of competence demanded of attorneys in capital cases assumes that those attorneys "pull out all the stops," by, at the very least, fully investigating available "defenses" in exculpation or mitigation of sentence. To say that the range of competence is higher in a capital case is not to pose a double standard; rather, it simply recognizes the obvious: the degree of experience, preparation and skill necessary to adequately defend a capital case is much greater than that required to defend a shoplifting charge. See Washington v. Strickland, 673 F.2d at 884 n.1, quoting Knight v. State, 394 So.2d 997, 1001 (Fla. 1981); Voyles v. Watkins, 489 F.Supp. 901 (N.D.Miss. 1980).

The special, bifurcated sentencing procedure employed in capital cases raises issues of diminished responsibility and psychiatric nuance not characteristic of most criminal trials in Virginia. Under Va. Code Ann. §19.2-264.4(B), a life sentence may be imposed, among other reasons, if the trier of fact finds either that "the defendant was under the influence of extreme mental or emotional disturbance," or that "the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired." Thus, presentation of the case-in-mitigation at the sentencing phase of a capital murder trial requires exploration of mitigating mental abnormality as an indispensable and central feature of the defense effort.

Several lower courts have brought the abstract language of McMann into sharper focus in specific cases, holding that trial counsel has the duty to "conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied 393 U.S. 849 (1968). Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), vacated as moot 446 U.S. 903 (1980); Blake v. Zant, 513 F.Supp. 772 (S.D.Ga. 1981).

In recent cases in the Fourth Circuit alone, this rule has been applied in two habeas corpus proceedings in which convictions were voided under the Sixth and Fourteenth Amendments because counsel had failed to explore possible defenses of insanity. In Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978), the attorney had failed to obtain any psychiatric evaluation of the possible existence of alcohol psychosis at the time of a rather bizarre offense. Judge Haynesworth stated that the defendant's Sixth Amendment right to effective assistance of counsel imposes

[a] correlative duty on defense counsel to undertake reasonable steps to investigate all open avenues of defense. The circumstances [here] clearly suggest that an exploration of his mental condition was such an avenue.

Similarly, in Brennan v. Blankenship, 472 F.Supp. 149 (W.D.Va. 1979), a conviction for malicious wounding was set aside in a habeas corpus proceeding because counsel failed to pursue a possible insanity defense. The district court ruled that "the failure to pursue the possible tactical advantage" provided by a psychiatrist's testimony, which indicated that the defendant was psychotic on the day of the shooting, "constituted a professional omission of critical magnitude." Id. at 158. See also Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 472 P.2d 921 (1970).

Because application of the McMann test is necessarily contextual, comparison of cases to glean general notions of what is or is not effective assistance is extremely difficult; the resulting argument tends to be anecdotal rather than analytical. However, one general principle may be drawn from the cases cited -- when the defendant is, or may be, mentally or emotionally disturbed, an attorney who fails adequately to explore psychiatric defenses has not rendered his client effective assistance. In Springer v. Collins, 444 F.Supp. 1049, 1060

(D.Md. 1977), the court concluded from the cases of the Fourth and Fifth Circuits (applying the McMunn standard) that the failure to investigate fully a psychiatric defense would be outside the "range of competence demanded of attorneys in criminal cases" where the following indications were present:

evidence of mental problems, existing either prior to or at the times of the offense, known or reasonably ascertainable by trial counsel; absence of other substantial or inconsistent defenses; and pendency of serious charges.

All three of these indications were present in Petitioner's case.

In the present case, Mr. Mason pleaded guilty to capital murder. Moreover, the prosecution's case-in-aggravation at sentencing was substantial. Thus, the only real issue in the case was whether mitigating factors were present; indeed, Mr. Mason's only "defense" against the death penalty was presentation of a case-in-mitigation based on mitigating mental abnormality. Yet, the record is clear that counsel took inadequate steps to explore, develop and prepare evidence in mitigation. Counsel at no time asked the court to order Petitioner to be examined for mitigating mental abnormalities; indeed, they did not even call Dr. Dimitris or Dr. Lee to ask them whether their investigations had disclosed anything helpful. Seeing that the report contained no mention whatsoever of mitigating mental abnormality, they made no efforts to find out why.

Because counsel had not asked for such an examination, none was made. Thus the psychiatrists could not have given an opinion on the subject, even had they been asked. Mr. Custis repeatedly complained that there was nothing that they could do -- no evidence that they could present -- in mitigation; the reason, of course, is that they had made no effort to explore the question with the examiners.

In sum, counsel failed to take the minimal steps necessary to explore, develop, and prepare a case in mitigation.

In the context of a capital trial, this failure was so serious as to fall outside of the range of competence normally demanded of attorneys in criminal cases. Counsel did not fulfill their duty "to undertake reasonable steps to investigate all open avenues of defense. The circumstances clearly suggested that an exploration of his mental condition was such an avenue." Wood v. Zahradnick, supra, at 982. In failing to investigate mitigating mental abnormality, counsel denied Mr. Mason his Sixth Amendment right to the effective assistance of counsel.

B. The Trial Court Erred in Requiring Petitioner To Establish Prejudice from Any Act or Omission Of Counsel.

In so ruling, Judge Russo took half of the McMann standard - the "range of competency" test - and mixed it with half of the old "farce and mockery of justice" standard, see Slayton v. Weinberger, 213 Va. 690, 694 (1973). Slayton v. Weinberger, having been based on Betts v. Brady, 316 U.S. 455, 473 (1942), held that the burden is on the Petitioner to show prejudice. The court's curious amalgam is supported by no currently valid case law.

The trial court, in its ruling from the bench on October 16, 1980, reflected in the order of December 8, 1980, held that Petitioner "bears the burden of establishing his claim of ineffective assistance of counsel by a preponderance of the evidence, and that Petitioner must establish prejudice from any act or omission of counsel." This Court has indicated that, once the prima facie case of ineffective assistance of counsel is established, a petitioner bears, at most, a burden of demonstrating that counsel's omissions were not harmless beyond a reasonable doubt. This Court has concluded that

[t]he assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'

Holloway v. Arkansas, 435 U.S. 475, 489 (1978), quoting Chapman

v. California, 386 U.S. 18, 23 (1967). It is therefore not an element of Petitioner's case to prove that he was harmed by counsel's failure to render effective assistance; rather, such harm or prejudice is presumed from the determination of ineffective representation.

The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser v. United States, 315 U.S. 60, 76 (1945).

In discarding the "farce and mockery" standard, the courts have abandoned its baggage as well. Consistent with the more realistic, modern "range of competence" standard of the Sixth Amendment rationale is the rule, frequently stated by this Court in cases such as Holloway, supra, and Chapman, supra, that ineffective assistance of counsel cannot be harmless error.

This Court has most recently reiterated that position in Cuyler v. Sullivan, 446 U.S. 335 (1980). There, the defendant was bringing a habeas corpus claim based on ineffective assistance of counsel as a result of joint representation. The Court held that the writ should not be granted, because Sullivan had not shown the existence of an actual conflict. In discussing the case law on point, however, the Court noted that, had Sullivan been able to show an actual conflict of interest, he would have been entitled to a new trial.

[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, at [435 U.S. 475,] 487-91. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Id. at 349-50. In other words, ineffective assistance of counsel will not be presumed from the fact of joint representation, but prejudice will be presumed on a showing that the joint

representation rendered counsel ineffective. See also Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975).

The Court's decision in Holloway explains the reason for a "no harmless error" rule. In that case, the issue was whether the defendants were required to prove prejudice in a case in which the court required joint representation in the face of timely objection. Although the facts are a bit different, the legal principle is clearly analogous. "Prejudice" and "harm" are, of course, synonymous; joint representation over objection of counsel is automatic grounds for reversal because the courts are instructed that the resulting representation is automatically ineffective. Chief Justice Burger, for the Court, rejected the argument that harm must be shown; a harmless-error rule

would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. . . . But in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

435 U.S. at 490-91.

The only difference between Holloway and an ineffective assistance case such as the instant case is that in joint representation cases, it is assumed that the reason that counsel

refrained from taking certain actions is that there was a conflict of interest; in ineffective assistance cases, the reason that counsel did not take certain actions may be negligence, incompetence, laziness, or ignorance. But the reason is not important to the question of whether there has been ineffective assistance; once the reason has been established, prejudice is presumed. Regardless of the reason, the criminal defendant has not received the benefit of his Sixth Amendment guarantee of the effective assistance of counsel.

Chief Justice Burger's reasoning about the difficulty of review is directly applicable to the instant case as well; the trial record does not reveal the harm. In this case the evil is what the advocate refrained from doing. The error does not appear readily on the face of the record, and its scope cannot be readily identified. Accordingly, the reviewing court can have no confidence in its conclusion concerning the likelihood that the error materially affected the deliberations of the factfinder. It was to avoid such unguided speculation that this Court has held that error will be presumed upon a showing of actual prejudice.

Most of the Circuits have recognized that the "range of competence" test requires a rejection of the rule that placed the burden on the defendant to show by a preponderance of the evidence that he had not been harmed by counsel's ineffective assistance

There is no substantial consensus among the circuits as to the kind or degree of prejudice that a Petitioner must show before he may obtain federal habeas relief on ineffective assistance grounds; yet for at least some types of cases, a large majority of the twelve Circuits appear to require a showing by the Petitioner of some prejudice. The Third, Eighth, Ninth, and District of Columbia Circuits clearly require a showing of prejudice, and have well-developed positions on the topic. The Second and Fourth Circuits also clearly require a showing of prejudice, although their

positions on this issue are not as fully developed. There are some indications that the First and Seventh Circuits also require a showing of prejudice. The Tenth Circuit has addressed the issue, but appears to be undecided. Only the Sixth Circuit appears to have rejected the prejudice requirement altogether, although there are reasons to believe that it is reconsidering its position.

Washington v. Strickland, 673 F.2d 896-900.

A Circuit-by-Circuit analysis of opinions concerning necessity for demonstrating some prejudice would be misleading inasmuch as the circuits also differ significantly on the question of how much prejudice would have to be shown. See 673 F.2d 896-900, nn.11-20, for a detailed recitation of the standards as they vary among the circuits. Of course, in Washington v. Strickland, the Fifth Circuit adopted the rule that Petitioner urged upon the trial court, upon the Virginia Supreme Court, and that Petitioner urges on this Court:

If the Petitioner carries the burden of showing ineffectiveness and prejudice, the State may then attempt to show beyond a reasonable doubt that although counsel's ineffectiveness was prejudicial to the Petitioner, in the sense that the trial would have proceeded in different and more helpful way in the absence of these errors by counsel, counsel's ineffectiveness was harmless in that it did not contribute to the Petitioner's sentence within the meaning of Chapman and its progeny.

673 F.2d at 902. The Fifth Circuit thus join the Third Circuit and the Eighth Circuit; See United States ex rel. Johnson v. Johnson, 531 F.2d 169, 177 (3rd Cir.) cert. denied, 425 U.S. 997 (1976); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

The only allocation of the burden of proof that is logically consistent with the McMann standard is the allocation described in Washington. When a court applies the McMann test concerning the question of whether counsel was ineffective, it must also apply the Washington rule allocating the burden of proof on prejudice. Such an allocation gives the Commonwealth a chance to argue that the ineffective assistance is harmless

error, but the burden is on the Commonwealth to prove that the error was harmless beyond a reasonable doubt.

The Fifth Circuit has held that the relevant standard for determining when prejudice has occurred is to consider the question of whether "the trial would have proceeded in a different and more helpful way in the absence of these errors by counsel." Id. at 902. There can be no doubt but that the introduction of the evidence concerning Petitioner's diagnosis as a psychotic, his long history of mental illness, and the other psychiatric evidence that could have been adduced would have constituted substantial evidence in mitigation of punishment, and would have been "helpful."

In view of the high stakes involved in death penalty cases this Court should be extremely reluctant to find that a significant omission of mitigating evidence could ever be harmless.

As an analogy, Petitioner looks to Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), amended on rehearing, 648 F.2d 446 (5th Cir. 1981), question certified to Supreme Court of Georgia, ___ U.S. ___ 72 L.Ed.2d 272 (1982). In Stephens, the Fifth Circuit, noting the fact that the process of weighing aggravating and mitigating evidence is still not susceptible of great structure, held that the imposition of the death sentence pursuant to more than one aggravating circumstance, when at least one of those aggravating circumstances was thrown out on appeal, invalidates the imposition of the death sentence altogether. If the process by which a fact finder weighed the evidence in aggravation and the evidence in mitigation, and therefore decided to impose the death penalty, were regulated by firm rules and standards, the outcome might be different. But where, as in that instance, the quality of the evidence in mitigation would have been significantly altered by competent counsel, it can never be

said that such an omission could constitute harmless error. Because of the finality of the death sentence and its qualitative difference, this Court has long required an extra measure of reliability in the proceedings leading to the imposition of the death sentence. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

After the plenary hearing on April 25, 1980, the trial court granted the Petitioner's motion, joined in by the Commonwealth, that Petitioner be returned to Central State Hospital for further examination by Dr. Dimitris. It was so ordered, and, by letter dated July 14, 1980, Dr. Dimitris reported back to the court with his findings. Dr. Dimitris' testimony and correspondence established the following facts in support of Petitioner's contention that there was evidence which would tend to establish the existence of a mitigating mental abnormality:

1. In his report to this court dated July 14, 1980, Dr. Dimitris offered a "bifurcated opinion." He stated that:

- a. If the statements given to Investigator K.E. Collins and appended to the testimony of the officer on September 28, 1978, specifically from Pages 51-70 on, are the facts of the case, then it is my opinion that Mr. Mason was able to formulate an intent after premeditation and deliberation with malice aforethought.
- b. Yet, if the facts are those that Mr. Mason presented to us during his examinations at Central State Hospital June 3, 5 and 11, 1980 (which are appended), he was at best "a hairs' breath" distant from unconsciousness and coma and due to that was unable to formulate an intent, deliberate, premeditate, and act with malice, because of reported heavy intoxication.

2. In a letter to Petitioner's counsel dated September 4, 1980, a copy of which is in the record of these proceedings, Dr. Dimitris stated that he was unable "to elaborate any further on the subject matter."

3. Dr. Dimitris' letters of July 14, 1980 and September 4, 1980, indicate that his opinion concerning the

degree to which Mr. Mason's psychological functioning was impaired at the time of the offense depends on the factual predicate for such an opinion:

- a. If asked to base an opinion on Mr. Mason's face-to-face account (in June, 1980), Dr. Dimitris' conclusions regarding the degree of Petitioner's intoxication would support a claim of mitigating mental abnormality, as defined by Virginia law.
- b. If asked to base an opinion on Mr. Mason's recorded statements to the police (in May, 1978), Dr. Dimitris' testimony would not support any claim that Mr. Mason lacked the mens rea for capital murder, but Dr. Dimitris would be unable to offer any opinion on mitigating mental abnormality.

4. Dr. Dimitris has stated, in a written statement submitted to the court (a letter from habeas counsel to Dr. Dimitris on October 7, 1980, as countersigned by Dr. Dimitris) that he has "no clinical basis for forming any opinion concerning which account (the transcripts of Mr. Mason's statements to the police in May, 1978) or his statements to [Dr. Dimitris] in June, 1980 more accurately or fully reflects his mental condition at the time of the capital offense."

This evidence demonstrates that if Mr. Mason's capital sentencing proceeding were held today, Dr. Dimitris' testimony would at least raise a substantial issue of fact concerning the presence of mitigating mental abnormality at the time of the offense. Similarly, if Dr. Dimitris had conducted this examination before Mr. Mason's capital sentencing trial in September and October, 1978, probative evidence tending to raise a substantial issue of fact concerning the presence of mitigating mental abnormality would have been available to counsel at that time.

If Mr. Mason's counsel had been aware of this information, it seems indisputable that they would have called upon Dr. Dimitris to testify, and to explain to the court what his "bifurcated" conclusions meant. Ultimately, it would have

been the responsibility of the factfinder to assess the reasons for the differences between the two accounts. In considering this question, the sentencing court would have been asked, by competent counsel, to consider some of the following possibilities:

1. Mr. Mason's statements to the police may be an incomplete predicate for an assessment of mitigating mental abnormality. A police interrogation is not designed to probe subtle questions of mental functioning. Police are not trained to elicit clinically relevant details or to observe mental state. The apparent discrepancies between the two accounts may, in this sense, be illusory because the police had neither the interest in probing the details of Mr. Mason's claim of intoxication nor the skill to do so.

2. To the extent that his two accounts are inconsistent, Mr. Mason's statements to the police may be less reliable than his statements to the examiners at Central State Hospital.

a. In light of his "mild retardation" (his I.Q. scores have ranged from 67 to 79), Mr. Mason may be highly suggestible; he may have been simply "going along" with the sheriffs in signing his confession, as Dr. Dimitris testified at the plenary hearing. (T. 30).

b. Mr. Mason may have distorted some of the facts in his confession (T. 18), for reasons that may relate to emotional or psychological factors. For example, he may have told the sheriffs that he had raped Mrs. Hand (there is absolutely no corroborating evidence of penetration or attempted penetration) because he may have thought or wished that he had.

In summary, the testimony by Dr. Dimitris, which counsel failed to explore, develop and present, would have raised a substantial issue of fact concerning Petitioner's mental functioning at the time of the capital offense. Moreover this

factual question could not have been resolved then -- and cannot be resolved now -- simply by discounting the reliability of Mr. Mason's account of his offenses to Dr. Dimitris. Instead, the reliability of the contrasting accounts would itself have been an issue of fact; on this issue, as well, the availability of expert testimony by Dr. Dimitris would have been of assistance to the factfinder.

Because the evidence which counsel failed to produce could have raised an issue of fact concerning mitigating mental abnormality and could have affected his sentence, Petitioner has established that the patterns of omissions by counsel were not harmless beyond a reasonable doubt.

The psychiatric evidence shows that there is a substantial issue of fact as to whether Mr. Mason was in fact suffering from a mitigating mental abnormality at the time that he killed Margaret Hand. It cannot now be said as a matter of law that Mr. Mason was not suffering from a mitigating mental abnormality; nor can it now be said as a matter of law, on the evidence now before this Court, that the trial court could not have found that Mr. Mason was suffering from a mitigating mental abnormality at the time of the offenses. Nor can it be said as a matter of law that the sentence would not have been affected by such a finding.

Reasonably diligent, informed and prepared counsel would have developed evidence that would at least have raised a factual issue in mitigation which would have been relevant to the application of the death sentence. In this regard it is clear that counsel's failures caused harm to Petitioner; it most certainly cannot be said that the failures were harmless beyond a reasonable doubt.


CONCLUSION

As noted above, the state court was clearly wrong in

holding that Petitioner was denied effective assistance of counsel at and in connection with the sentencing phase of his capital trial. But Petitioner prays this Court to hear this case not merely to rectify the injustice to him; the issues raised herein are important questions, on which an authoritative determination by this Court is necessary. This Court has not had occasion to give content to the text enunciated in McMann v. Richardson, 397 U.S. 759 (1970). This Court has never established which party has the burden of demonstrating prejudice, and what burden that party must meet. These are issues that recur not only in Virginia, but in every state of the Union. These questions come up not only in capital cases, but in every case. Ineffective assistance of counsel claims are being raised with great frequency in habeas corpus petitions, and the District Courts and Circuit Courts have all developed different standards. Petitioner prays this Court to grant his Petition for Writ of Certiorari to hear the questions presented herein, and to resolve this conflict.

MORRIS ODELL MASON

By Counsel



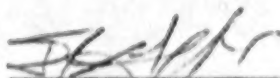
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MAILING CERTIFICATE

I, F. Guthrie Gordon, III, a member of the bar of this Court, make oath that, on or before July 19, 1982, I caused this

Petition for Writ of Certiorari, along with the accompanying Motion to Proceed In Forma Pauperis and the supporting Affidavit, to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused on copy of each of the above-mentioned documents to be sent to the Honorable James E. Kulp, Senior Assistant Attorney General for the Commonwealth, 101 North Eighth Street, Richmond, Virginia, 23219, by depositing the documents in the United States Post Office or mailbox, with first class postage prepaid.



F. Guthrie Gordon, III

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

The foregoing instrument was subscribed and sworn before me on this 19th day of July, 1982, by F. Guthrie Gordon, III.


Notary Public

My commission expires:

June 18, 1984

TABLE OF CONTENTS OF APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW	1
ORDER OF APRIL 15, 1981	11
ORDER OF APRIL 20, 1982	13

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF NORTHAMPTON

MORRIS ODELL MASON,

Petitioner,

v.

EDWARD C. MORRIS

Superintendent

Mecklenburg Correctional Center,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a bifurcated bench trial, Morris Odell Mason, who pleaded guilty to capital murder, was convicted by this court of wilful, deliberate and premeditated murder during the commission of or following rape pursuant to Code of Virginia (1950), as amended, Section 18.2-31(e) and after a penalty hearing his punishment was fixed at death. After a post-conviction sentencing hearing at which the court received the report of a probation officer, the court confirmed the penalty fixed at the earlier penalty hearing and sentenced defendant to be executed in accordance with Virginia Code Section 19.2-264.5. Mason came before the Supreme Court of Virginia for an automatic review of his death sentence which court on April 20, 1979 upheld the decision of the trial court. Mason v. Commonwealth, 219 Va. 1091. On October 15, 1979, the Supreme Court of the United States denied Mason's petition for a writ of certiorari.

On January 2, 1980, Mason filed a petition for a writ of habeas corpus attacking his conviction and death sentence imposed by this court. On January 15, 1980, this court ordered a plenary hearing on the petition for a writ of habeas corpus and stayed petitioner's execution which was set for January 22, 1980. At the same time, the court ordered that there be a pre-trial hearing to sort out the issues to be addressed at the plenary hearing. The pre-trial hearing was held on February 28, 1980 and on April 14, 1980, the court entered an order granting a hearing on Count IV of the petition for a writ of habeas corpus and denying a hearing as to Counts I, II, III, V, VI, VII, VIII and IX.

Count One of the petition for a writ of habeas corpus alleges that the Virginia capital sentencing procedure is unconstitutional on its face and as applied under the Eighth and Fourteenth amendments to the Constitution of the United States and under Article One, Section Nine of the Constitution of Virginia.

This court ruled at the pre-trial hearing that this issue was raised on appeal to the Supreme Court of Virginia and was decided adversely to the petitioner. Mason v. Commonwealth, 219 Va. 1091.

Count Two of the petition alleges that the capital sentencing procedure of Virginia has resulted in arbitrary and discriminatory application of the death penalty based on the race, gender and financial status of the offender and the victim and that petitioner's death sentence was imposed pursuant to this discriminatory pattern and practice in violation of the Eighth and Fourteenth amendments to the Constitution of the United States and Article One, Section Eleven of the Constitution of the Commonwealth of Virginia.

This court ruled at the pre-trial hearing that this issue was not raised during the trial of petitioner nor was it raised on appeal to the Supreme Court of Virginia and that a petitioner for a writ of habeas corpus has no standing to raise such an issue in his petition for the first time. The Supreme Court of Virginia in the case of Ferguson v. Penitentiary Superintendent, 215 Va. 269 said as follows:

"All the issues raised by the petitioner, Ferguson, in his petition for a writ of habeas corpus, or set forth in his assignments of error, could have been raised and adjudicated in the trial court and upon direct appeal to this court. He failed to do this, and therefore lacks standing to raise the issues on habeas corpus."

Count three alleges that the trial court's refusal to allow funds for an independent psychiatrist to examine petitioner and petitioner's trial counsel deprived petitioner of adequate and effective assistance of counsel in violation of the Sixth and

Fourteenth Amendments to the Constitution of the United States and Article One, Sections Eight and Eleven of the Constitution of Virginia.

Once again, this court ruled at the pre-trial hearing that this issue was raised on appeal to the Supreme Court of Virginia and decided adversely to the petitioner. In the case of Mason v. Commonwealth, 219 Va. 1091, the Virginia Supreme Court stated as follows in quoting from the case of Houghtaling v. Commonwealth, 209 Va. 309, cert. denied, 394 U. S. 1021:

"The precise point in issue, arising under similar circumstances, was before the United States Supreme Court in United States v. Baldi, 344, U. S. 561, 73 S.Ct. 391, 97 L.Ed. 549, 556 (1953). There, the defendant contended that 'the assistance of a psychiatrist was necessary to afford him adequate counsel' and that 'he should have been given technical pretrial assistance by the State.' The court said, 'We cannot say that the State has that duty by constitutional mandate.' That holding is applicable to and dispositive of the question before us."

Count IV of the petition alleges that the petitioner's attorneys failed to provide representation within the range of competence demanded of attorneys in criminal cases and petitioner was therefore denied adequate and effective assistance of counsel.

This court granted a plenary hearing on this issue which was conducted on April 25, 1980 and will be discussed later in much greater detail.

Count Five of the petition alleges that in light of petitioner's history of mental disorder, and the circumstances of the offenses occurring between May 2, 1978 and May 14, 1978, the court's failure to order a psychiatric evaluation, sua sponte, as authorized by law under Section 19.2-300, inter alia, to assist the court to determine the presence of mitigating mental abnormality as defined in Va. Code Section 19.2-264.4(b) and to determine, according to Section 19.2-264.5, whether a sentence of death would be appropriate constituted an abuse of the discretion afforded the Court under those statutes, and denied Petitioner Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States and Article One, Sections Eight and Eleven of the Constitution of Virginia.

This court ruled at the pre-trial hearing that since this issue was not raised during the trial nor on appeal to the Supreme Court of Virginia, it could not be raised for the first time in a petition for a writ of habeas corpus.

Also, as to claim of petitioner that the Trial Judge should have ordered the psychiatric evaluation, sua sponte, pursuant to Section 19.2-300 and other sections, Section 19.2-301 states that the examination provided for in Section 19.2-300 may be dispensed with if "a prior report on such person has been submitted to the court by the Department during the proceedings, to be made by a psychiatrist employed in any State hospital or in any mental hospital maintained by the State."

On page 1096 of the case of Mason v. Commonwealth, 219 Va. 1091 it is reported as follows:

"At his counsel's request prior to his preliminary hearing on this and other pending charges, Mason received two separate psychiatric examinations, one by W. A. Dretzgen, M.D., at the Eastern Shore Mental Health Center, and the other by the psychiatric staff at Central State Hospital."

Count Six of the petition states that the circumstances of petitioner's trial were, in their totality, so unfair and prejudicial that the imposition of the capital sentence would deprive him of his life without Due Process of Law in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article One, Sections Eight and Eleven of the Constitution of Virginia.

Once again, this court ruled at the pre-trial hearing that since this issue was not raised at trial nor on appeal to the Supreme Court of Virginia, it could not be raised for the first time in a petition for a writ of habeas corpus.

Count Seven of the petition states that imposition of the death penalty is unnecessarily cruel and is forbidden by the Eighth and Fourteenth Amendments to the Constitution of the United States.

Once again, this court ruled at the pre-trial hearing that this matter was not raised at trial nor on appeal.

In addition, the case of Spinkellink v. Wainwright, 578 F.2d 582 (1978) at page 616 holds that such a contention is without merit. It states as follows:

"The petitioner's fifth contention is that electrocution, which is Florida's method of carrying out a sentence of capital punishment is unnecessarily tortuous and wantonly cruel and therefore constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Supreme Court has previously considered this assertion in In re Kemmler, 136 U.S. 436, 10 S.Ct., 930 where the Court held that a New York statute providing for electrocution as the method of carrying out a sentence of capital punishment was constitutional."

The Eighth Count alleges that because petitioner is only the third person sentenced to death under Virginia Code, Sections 19.2-264.2, et seq., execution of the death sentence in his case at the present time would be inconsistent with the General Assembly's directive that the death penalty not be imposed when the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

This court dismissed that count at the pre-trial hearing because the Supreme Court of Virginia had addressed that question on appeal and ruled adversely to the petitioner. See Mason v. Commonwealth, 219 Va. 1091 at page 1100 wherein the Supreme Court of Virginia stated as follows:

"Neither do we believe that the sentence imposed on Mason was excessive and disproportionate to the penalty imposed in similar cases. When the evidence here is compared with that in Smith and Wye, supra, the only other cases reviewed by this court under the revised death penalty statutes, it discloses aggravating circumstances here which equal or exceed the aggravating factors found in each of those cases."

Count IX of the petition states that counsel, although they were in possession of evidence from which they knew, or should have known, that the corpus delicti of rape, and therefore of capital murder, could not be proved without petitioner's confession, counsel failed to tell petitioner of this defense and recommended that petitioner plead guilty and that petitioner was therefore denied adequate and effective assistance of counsel.

Although Count Nine was denied by order of April 14, 1980 which carried out the rulings of the court at the pre-trial hearing held on February 28, 1980, this count was considered at the plenary hearing held on April 25, 1980 due to the fact that it was also raised under Count Four. Count Nine will also be explored later in greater detail.

When referring to the transcripts of the various hearings and trials, the Court, when referring to the plenary hearing conducted on April 25, 1980, will use (P.N.---) and when referring to trial transcripts it will designate by the letter "T", date and page (T. date, page).

By order of December 8, 1980, this court ruled that the standard to be applied in determining competency of counsel is whether counsel's performance was within the range of competence demanded of attorneys in criminal cases and that petitioner bears the burden of establishing his claim of ineffective assistance of counsel by a preponderance of the evidence and that petitioner must establish prejudice from any act or omission of counsel.

Petitioner contends that a greater standard of competency is demanded of attorneys in capital cases than in other criminal cases. This court does not agree. Although it is apparent that death, by whatever means, is final insofar as earthly existence is concerned, it is also apparent that life imprisonment or imprisonment for a term of years is very devastating and this court does not agree that there is a greater standard of competency required for the handling of a capital case as opposed to other criminal cases.

Among other cases, petitioner has cited Cooper v. Fitzharris, 551, F.2d. 1162 (9th Cir. 1977). He cited this case in oral argument before this court on October 16, 1980 and again in his "Memorandum of Law" filed on November 26, 1980. However, that was a panel opinion which was overruled by the Ninth Circuit Court of Appeals sitting en banc. See Cooper v. Fitzharris, 586 F.2d 1325 (1978) at page 1327 wherein the court ruled that where the claim of ineffective assistance of counsel is founded upon specific acts and omission of defense counsel at trial, the accused must

show that counsel's errors prejudiced the defense. This court is of the opinion that it ruled correctly by its order of December 8, 1980 which stated that "petitioner bears the burden of establishing his claim of ineffective assistance of counsel by a preponderance of the evidence, and that petitioner must establish prejudice from any act or omission of counsel."

The court is further of the opinion that it ruled correctly in the same order that "the standard to be applied in determining competency of counsel is whether counsel's performance was within the range of competence demanded of attorneys in criminal cases."

Since it goes directly to the question of whether or not there was an actual capital case, the court will consider first the contention that counsel was ineffective in not properly advising petitioner in regard to the legal principle that there must be corroborating evidence of a crime before a person may be convicted on the basis of a confession and after exploring that, it will address the allegation of ineffectiveness due to failure of counsel to explore, develop and present available evidence of mitigating mental abnormality.

Mr. H. P. Custis, Jr., one of the trial counsel, testified that he and Mr. R. B. Phillips, the other trial counsel, had both advised petitioner not to plead guilty and that he had rejected their advice. (P.H. p. 48).

They felt that considering the circumstances, a capital crime, the severity of the penalty, that they would have been better off before a jury because of the possibility of "persuading one person on that jury versus one before His Honor." (P.H. p.48). Both of them testified that they had explained to their client that he could not be convicted upon an uncorroborated confession. (P.H. pp. 62, 138). In spite of that advice, petitioner persisted that he enter a plea of guilty. This evidence was elicited at the plenary hearing before this court on April 25, 1980 and was not contradicted by anyone. There seems to be no question that both trial counsel thoroughly understood the law in regard to an uncorroborated confession, that they advised their client in this regard and that he rejected their advice.

Cases hold that where there is a confession, all that is required is slight evidence to establish the corpus delicti. Campbell v. Commonwealth, 194 Va. 825 and Lucas v. Commonwealth, 201 Va. 599. Also, the corpus delicti may be established by circumstantial as well as direct evidence. Cochran v. Commonwealth, 122 Va. 801 and Lane v. Commonwealth, 219 Va. 509. The transcripts of the trial of the case at bar are replete with circumstantial evidence to justify a conviction of wilful, deliberate and premeditated murder during the commission of or following rape.

Let us now discuss the question which this court considers to be the most important aspect of the case, i.e., whether or not trial counsel were ineffective in not exploring, developing, and presenting available evidence of mitigating mental abnormality pursuant to Section 19.2-264.4 of the Code of Virginia.

Trial counsel in this case were presented with a most difficult situation. Mr. Custis testified at the plenary hearing in answer to a question as to whether or not he had ever asked Dr. Dimitris or anyone on the staff of Central State Hospital as to whether or not they had an opinion in regard to mitigating mental abnormalities that he had not asked them. (P.H. p.45). His complete answer was: "No, sir. In view of the record that we had before us at that time, knowing the statements which had been made and our discussions with Mr. Mason and also the two responses to the commitment order of May 26th or 27th -- whatever it was -- from Doctor Dimitris, we did not think that Central State or Doctor Dimitris or anyone on that staff in view of that with no additional evidence other than the statements -- that they could be beneficial to us." (P.H. p.45). With this in mind, they tried to attack the problem in another manner. They talked to petitioner's girlfriend and his mother. "We tried to formulate or find out if in fact he had any drugs, where he got them, what they were, when he got them; but we were unable to." (P.H. p.70).

They said that petitioner did not furnish them the names of anyone who could indicate that he had drugs or alcohol. (P.H. p. 70). They discussed the portion of the statute with petitioner which dealt with the mitigating mental abnormalities and they tried to elicit his testimony. He refused. They tried to elicit testimony from family members to no avail. (P.H. p. 82). All they had were the various reports from the various hospitals, including Central State, so these were presented to the Court. (T. 9/29/78 pp. 18-22).

Trial counsel also explained that they did not subpoena any of the psychiatrists. When asked why, Mr. Custis replied: "We had the reports and we had the summaries, and there was no prior history other than what Doctor Dimitris explained as to his condition I think in Pennsylvania. We were aware of what were contained in those reports but did not think that the doctor's presence would have been beneficial." (P.H. pp. 71, 72). They were also cognizant of the fact that if the doctors were present, they would have been subject to cross-examination. (P.H. p. 72). They were of the opinion that without some additional evidence, which they tried to get but were unsuccessful, that neither Dr. Dimitris or any other doctor would be helpful in light of the statements made by petitioner, their discussions with him and the psychiatric reports. (P.H. pp. 45, 77). "It's a judgment call at the time, and that's what we did." (P.H. p. 77).

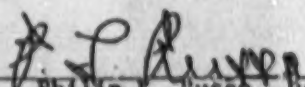
On July 14, 1980, Dr. Dimitris submitted a report to this court after his examination of petitioner pursuant to order entered on May 14, 1980. The purpose of the examination was to determine whether at the time of the capital offense committed on May 13, 1978, the petitioner was under the influence of extreme mental or emotional disturbance or whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. The essence of his opinion was that if the statements given to Investigator K. E. Collins by petitioner as testified to by Officer Collins on September 28, 1978, specifically from pages 51-70 on (T. 9/28/78 pp. 51 through 70) are the facts of the case, then there are no mitigating abnormalities. However, if the facts are as presented

by petitioner during his examination at Central State Hospital on June 3, 5, and 11, 1980, then he was unable to formulate an intent, deliberate, premeditate and act with malice, because of reported heavy intoxication.

This court has made a careful study of the record in this case. It is very significant that petitioner gave statements to several different people after the commission of the crime describing his participation therein and all of these statements were essentially the same as that given to Investigator K. E. Collins as testified to by him on September 28, 1978 to which Dr. Dimitris referred in his report and opinion of July 14, 1980. In addition, the physical evidence found at the scene of the crime certainly is in accord with the statements.

When petitioner went to Central State Hospital to be examined pursuant to order of this Court entered on May 14, 1980, he was well aware that he had been convicted of a capital crime and sentenced to die.

The Court is of the opinion that petitioner has not carried the burden of establishing prejudice as a result of any omission of trial counsel and is of the opinion and concludes that for each claim of ineffective assistance of counsel raised herein, petitioner was afforded counsel who were competent, diligent, thorough, and ably represented petitioner within the range of competence demanded of attorneys in criminal cases. The Court is further of the opinion that even though several counts of the Petition for Habeas Corpus were dismissed because they were not raised during trial or on appeal, that had they been raised, there is no merit to these contentions and would have been decided adversely to petitioner. Petitioner's request for habeas corpus relief is hereby denied. The Office of the Attorney General shall prepare an order in accordance with these Findings of Fact and Conclusions of Law. Copies of this document have this day been mailed to petitioner and counsel. Petitioner is notified herewith of his right to appeal.


Philip L. Russo, Judge

March 17, 1981
(Date)

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Tuesday the 20th day of April, 1982.*

Morris Odell Mason,

Appellant,

against Record No. 811168

Edward C. Morris, Superintendent
of the Mecklenburg Correctional Center,

Appellee.

From the Circuit Court of Northampton County

Finding no reversible error in the judgment complained of,
the court refuses the petition for appeal filed in the above-styled
case.

The said circuit court shall allow court-appointed counsel
the total fee set forth below and also their necessary direct out-of-
pocket expenses. And it is ordered that the Commonwealth recover of
the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By:

Allen L. Lucy
Deputy Clerk

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorneys' fee

\$400.00 plus their costs and
expenses

Filing fee

25.00

Teste:

Allen L. Lucy, Clerk

By:

Allen L. Lucy
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF NORTHAMPTON

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS, Superintendent,
Mecklenburg Correctional Center

Respondent

FINAL ORDER

On April 25, 1980, came Morris Odell Mason, the petitioner in person and by John C. Lowe, Richard J. Bonnie, J. Lloyd Snook, III, and John W. Drescher, his attorneys, and came also the Respondent by James E. Kulp, Deputy Attorney General, to be heard upon the Petition for a Writ of Habeas Corpus, upon pleadings duly received and filed and orders heretofore entered.

After hearing evidence and upon motion of the parties the Court on May 14, 1980, ordered the petitioner to be examined by Dr. James C. Dimitris and the staff of Central State Hospital and a report of this examination having been filed with the Court; and upon consideration of the evidence, argument of counsel and the memorandums of law, the Court finds and is of the opinion that the prayers of the petition should be denied and the petition dismissed for the reasons set forth in its findings of fact and conclusions of law dated March 17, 1981, which are hereby incorporated and made a part of this order as if set out in full herein.

Now, therefore, for the reasons set forth, the Court ADJUDGES, ORDERS, and DECREES that the prayers of the Petition for a Writ of Habeas Corpus be denied and the petition

dismissed, the writ discharged and the petitioner remanded to the custody of the Respondent.

It is further ORDERED that the petitioner's stay of execution be continued in effect until the resolution of his appeal to the Virginia Supreme Court, ~~and for a reasonable time thereafter.~~

The Clerk is directed to certify copies of this order to the petitioner, the Respondent, John C. Lowe, Esquire, and James E. Kulp, Deputy Attorney General.

ENTER this 15th day of April, 1981.

P. L. Russo
JUDGE

I ask for this:

James E. Kulp
Counsel for Respondent

Seen and objected to:

J. Lloyd Swartz
Counsel for Petitioner

A Copy:

Teste: Clyde E. Gibb, Clerk

No. 82-5093

RECEIVED

JUL 21 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, Morris Odell Mason, by his counsel, moves this Court to grant him leave to proceed in forma pauperis with respect to his Petition for Writ of Certiorari to the Supreme Court of Virginia, which Petition for Writ of Certiorari is filed contemporaneously herewith, representing unto the Court as follows:

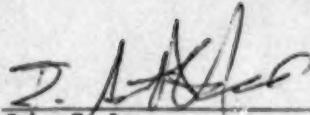
1. Petitioner is unable to pay fees, costs or security for the Petition for Writ of Certiorari filed on Petitioner's behalf.

2. The nature of the Petition for Writ of Certiorari is to seek review of the judgment entered by the Supreme Court of Virginia affirming the imposition of the sentence of death upon your Petitioner for capital murder. Appellant was convicted under Va. Code Ann. §18.2-31(1977 Cum. Supp.). He contends in his Petition for Writ of Certiorari that he was denied the effective assistance of counsel, guaranteed him under the Sixth and Fourteenth Amendments to the United States Constitution.

3. Appellant is filing the affidavit required by 28 U.S.C. §1915 contemporaneous with the filing of this application.

Morris Odell Mason

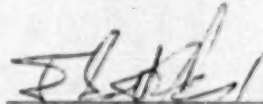
By Counsel



John C. Lowe
F. Guthrie Gordon, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

MAILING CERTIFICATE

I, F. Guthrie Gordon, III, a member of the Bar of this Court, make oath that, on or before July, 19, 1982, I caused this Motion for Leave to Proceed In Forma Pauperis, with the supporting affidavit, to be deposited in a United States Post Office or mailbox, with First-Class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused on copy of each of the above-mentioned documents to be sent to James E. Kulp, 101 North Eighth Street, Richmond, Virginia, 23219, by deposit in the United States Post Office mailbox, with First-Class postage prepaid.



F. Guthrie Gordon, III

NOTARIAL CERTIFICATE

Sworn, subscribed and acknowledged before me this 19th day of July, 1982, by F. Guthrie Gordon, III.


Notary Public

My commission expires:

June 18, 1984

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RECEIVED

JUL 21 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-5093

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR
LEAVE TO PROCEED IN FORMA PAUPERIS

I, Morris Odell Mason, having been duly sworn, do depose and say that:

1. I am the Petitioner in the above-styled cause;
2. That I am indigent and unable to pay the fees and costs, or to give security for the fees and costs, associated with the prosecution of the attached Petition for Writ of Certiorari to the Supreme Court of Virginia;
3. That I was certified as an indigent at trial, and was appointed an attorney at that time;
4. That I pursued an appeal to the Supreme Court of Virginia as an indigent with court-appointed counsel, pursuant to the Rules of the Supreme Court of Virginia, and that I pursued my Petition for Writ of Certiorari in forma pauperis;
5. That I brought the Petition for Writ of Habeas Corpus in the Circuit Court for the County of Northampton, in forma pauperis, and that I pursued my appeal in the Supreme Court of Virginia from the denial of that Petition with court-appointed counsel;
6. That I have been incarcerated since my arrest on this charge four years ago;

7. That I am not presently employed, and have not been employed since before my arrest four years ago;

8. That I have not received income from any other source in the last twelve months, and that I have no cash, bank accounts, or valuable property.

WHEREFORE, I respectfully pray this Court, pursuant to the attached Application to Proceed In Forma Pauperis, to allow me to file the attached Petition for Writ of Certiorari in forma pauperis.

Morris Odell Mason
Morris Odell Mason

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

COUNTY OF MECKLENBURG, to-wit:

Subscribed, sworn and acknowledged before me this 18
day of June, 1982, by Morris Odell Mason.

Dennis B. Black
Notary Public

My commission expires:

June 15, 1985

DC CWN
9
DISTRIBUTED

AUG 24 '82

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AUG 24 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-5093

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MORRIS ODELL MASON,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

BRIEF IN OPPOSITION TO CERTIORARI

9
Counsel for Respondent
James E. Kulp
Senior Assistant Attorney General
Supreme Court Building
101 North Eighth Street - 6th Floor
Richmond, Virginia 23219
(804) 786-6565

QUESTIONS PRESENTED

1. WAS THE REPRESENTATIONS AFFORDED PETITIONER BY TRIAL COUNSEL WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES?
2. DID THE TRIAL COURT RULE CORRECTLY IN IMPOSING THE BURDEN ON PETITIONER TO ESTABLISH PREJUDICE FROM ERRORS AND OMISSIONS OF COUNSEL?
3. IF PETITIONER DID BEAR THE BURDEN OF ESTABLISHING PREJUDICE BY A PREPONDERANCE OF THE EVIDENCE, DID PETITIONER MEET THAT BURDEN?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	1
JURISDICTION.....	2
STATEMENT OF THE CASE.....	2
ARGUMENT I	
THE TRIAL COURT CORRECTLY RULED THAT PETITIONER HAD RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL.....	6
ARGUMENT II	
THE TRIAL COURT PROPERLY RULED THAT PETITIONER WAS REQUIRED TO ESTABLISH PREJUDICE FROM ANY ACT OR OMISSIONS OF COUNSEL.....	14
ARGUMENT III	
THE PETITIONER DID NOT BEAR HIS BURDEN OF ESTABLISHING PREJUDICE.....	18
CONCLUSION.....	23
CERTIFICATE OF SERVICE.....	23

TABLE OF CITATIONS

Cases

	<u>Page</u>
<u>Brennan v. Blankenship</u> , 472 F. Supp. 149 (W.D. Va. 1979).....	10,11
<u>Casey v. United States</u> , 276 U.S. 413,418 (1928).....	17
<u>Chambers v. Maroney</u> , 399 U.S. 42, at 53-54, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).....	16
<u>Cooper v. Fitzharris</u> , 586 F.2d 1325, 1330 (9th Cir. 1978).....	11,18
<u>Darcy v. Handy</u> , 351 U.S. 454 (1956).....	16
<u>Dorsey v. State</u> , 586 S.W.2d 810 (Ct. App. Mo. 1979)..	12
<u>Earvin v. State</u> , 582 S.W.2d 794 (Cr. App. Tx. 1979)..	13
<u>Franklin v. United States</u> , 589 F.2d 192 (5th Cir. 1979), <u>cert. denied</u> , 441 U.S. 950.....	13
<u>Gedders v. United States</u> , 425 U.S. 80 (1976).....	14
<u>Henderson v. Kibbe</u> , 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977).....	16
<u>Herring v. New York</u> , 422 U.S. 853 (1975).....	14
<u>Holloway v. Arkansas</u> , 435 U.S. 475 (1978).....	14
<u>Kibert v. Blankenship</u> , 611 F.2d 520, 526 (4th Cir. 1979), <u>cert. denied</u> , 446 U.S. 911 (1980), <u>reh.</u> <u>denied</u> , 446 U.S. 993 (1980).....	18
<u>Mason v. Commonwealth</u> , 219 Va. at 1094.....	19
<u>Matthews v. United States</u> , 518 F.2d 1245 (7th Cir. 1975).....	18
<u>Parton v. Wyrick</u> , 614 F.2d 154, 158 (8th Cir. 1980).....	18

<u>Reynolds v. Mabry</u> , 574 F.2d 978 (8th Cir. 1978).....	8
<u>Robinson v. United States</u> , 448 F.2d 1255, 1256 (1970)...	8
<u>Sanchez v. State</u> , 589 S.W.2d 422 (Cr. App. Tx. 1979).....	13
<u>Sanders v. Eyman</u> , 600 F.2d 728 (9th Cir. 1977).....	13
<u>United States v. Addonizio</u> , 442 U.S. 178, 184 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979).....	15
<u>United States v. Baca</u> , 451 F.2d 1112 (10th Cir. 1971)...	18
<u>United States v. DeCoster</u> , 624 F.2d 196, 203 (D. C. Cir. 1979).....	12,14,15,17
<u>United States v. Frady</u> , ___ U.S. ___, 102 S.Ct. 1584, 1593 (1982).....	15,16,17
<u>United States ex rel. Green v. Rundle</u> , 452 F.2d 232, 235 (3rd Cir. 1971).....	12
<u>United States v. Michael</u> , 645 F.2d 252, 254 n. 2 (5th Cir. 1981) (en banc, cert. denied ___ U.S. ___, 102 S.Ct. 489 (1981)).....	9,18
<u>United States v. Swinehart</u> , 617 F.2d 336, 340 (3rd Cir. 1980).....	17,18
<u>Washington v. Estelle</u> , 648 F.2d 276 (5th Cir.), cert. denied, ___ U.S. ___, 102 S.Ct. 402 (1981).....	8
<u>Washington v. Strickland</u> , 673 F.2d 879 (1982), Reh. en banc granted ___ F.2d ___ (5th Cir. May 14, 1982).....	9,18
<u>Washington v. Watkins</u> , 655 F.2d 1346, 1356 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2021 (1982).....	8,9
<u>Wood v. Zahradnick</u> , 578 F.2d 980 (4th Cir. 1978).....	10,11

OTHER AUTHORITIES

28 U.S.C. § 1257(3).....	2
Section 19.2-264.4 Code of Virginia (1950), as amended.....	7

JURISDICTION

The petitioner asserts jurisdiction pursuant to 23 U.S.C. § 1257(3), to review the judgment of the Supreme Court of Virginia of April 20, 1982, denying petitioner's Petition for Appeal.

STATEMENT OF THE CASE

The petitioner is attacking the effectiveness of his counsel only during the sentencing phase of his trial, accordingly the facts will be limited to this portion of petitioner's trial.

References will be to the transcript of the habeas corpus proceeding and in conformity to the designation used by petitioner will be cited as (T. ____). References will also be to the transcripts of petitioner's trial and will be designated (T.T. ____) followed by date of the transcript and page reference.

Upon being appointed, counsel immediately moved to have petitioner examined. Counsel additionally moved for funds for the appointment of a private psychiatrist. The report of Dr. Dietzgen of May 26, 1978 reports that petitioner was able to stand trial and assist in his own

defense. The report further states that while petitioner was reluctant to go over charges with Dr. Dietzgen, he did explain the meaning of rape and that it was wrong to have sex with an unwilling partner. There is no indication in the report that petitioner denied the crimes. Not satisfied with the report of Dr. Dietzgen, counsel requested a further psychiatric evaluation from Central State Hospital. Dr. Dimitris filed a report dated June 27, 1978, advising that petitioner had undergone psychiatric, psychological, and sociological evaluations and that petitioner's previous hospitalization had been reviewed. This report concluded as follows:

Petitioner "is not mentally ill (not insane) and is not feeble-minded. He is aware of the charges which are pending against him, the seriousness of the charges, the pending litigation and the possible outcome of a trial. It is our opinion that he is mentally competent and capable of cooperating with his counsel in the preparation of his defense."

This report concluded with a request that information, such as any statement of the petitioner at the time of arrest, information from officers who arrested him and had dealings with him as to his behavior during questioning and while incarcerated, be sent in order to enter an opinion as to petitioner's competence and sanity at the time of the offenses.

This information was forthwith forwarded to Central State and Dr. Dimitris replied by letter dated August 23, 1978, in which he opined that petitioner was aware of the nature, quality and consequences of his acts and furthermore knew his acts were wrong. There is no mention in these reports that petitioner had denied his involvement in the crimes or that there was any indication petitioner might have been suffering from any mental deficiencies at the time of the offenses.

Counsel then filed a motion to suppress petitioner's several confessions. At the suppression hearing petitioner testified that he gave the first statement because he was tired and sleepy and gave the other statements because he had given the first one. (T.T. 9/13/78 pp. 129-131). It is interesting to note that petitioner never claimed that he had not committed the offenses. (T.T. 9/13/78 pp. 126-142). Upon the completion of the testimony the trial court found that petitioner's statements had been voluntarily and intelligently given. (T.T. 9/13/78 p. 143).

The petitioner was then brought to trial where he entered pleas of guilty to the offenses against the advice of his attorneys. (T.T. 9/28/78 p. 11). During the examination by the trial court the petitioner admitted he was entering the pleas of guilty because he was guilty and specifically admitted he had raped Mrs. Hand. (T.T. 9/28/78 pp. 4-5). The petitioner

additionally advised the court that he had had sufficient time to discuss his case with his attorneys including possible defenses. (T.T. 9/28/78 p. 9). The trial court found petitioner's pleas to have been knowingly and voluntarily entered. (T.T. 9/28/78 p. 11).

At the sentencing portion of the bifurcated proceeding counsel presented mitigation that was available to them. Counsel tried to support petitioner's statements that he was under the influence of drugs or alcohol at the time of the offenses. They talked to his girlfriend and mother. They were unable to obtain from petitioner the name of any person who could support this theory and their investigation disclosed none. (T. pp. 70,139). Members of petitioner's family were contacted but refused to assist. (T. pp. 82, 140). The petitioner himself refused to testify even though counsel wanted him to. (T.T. 9/29/78 pp. 21,22). Counsel presented the reports of petitioner's prior hospitalizations at Eastern State, the VA Hospital in Northport, New York, and the VA Hospital in Coatesville, Pennsylvania. (T.T. 9/29/78 pp. 18-22). Counsel felt they "were up against a brick wall." (T. p. 140). Additionally, counsel made an impassioned plea for petitioner's life. (T. 9/29/78 pp. 34-40).

ARGUMENT I

THE TRIAL COURT CORRECTLY RULED THAT PETITIONER HAD RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL.

Petitioner asserts that counsel failed to explore, develop and present available evidence of mitigating mental abnormality. The record shows that counsel sought and secured two separate psychiatric examinations. In neither the report of Dr. Dietzgen nor the reports of Dr. Dimitris is there any indication that petitioner was suffering from any mental deficiencies at the time of the offenses. To the contrary, the reports showed that petitioner had undergone psychiatric, psychological and sociological evaluations and had an electroencephalographic examination. The reports found petitioner competent and that he was aware of the nature, quality and consequences of his acts and knew his acts were wrong. Counsel have testified that petitioner had described to them in detail the circumstances surrounding the offenses. (T. pp. 69,138). They found no real inconsistencies between what petitioner had told them and what petitioner had told the police. (T. p. 69). Counsel were unable to develop any evidence to support petitioner's statements that he was under the influence of drugs or alcohol. (T. pp. 70,139). It is important to note that petitioner never gave counsel any indication that he was unaware of what he was doing at the time he committed the offenses and in fact was extremely

explicit in describing the entire episode. (T. p. 77).

Counsels' impression was that petitioner knew totally what he was doing from the day of the crimes through the time he was convicted. (T. p. 54).

While counsel did not call Dr. Dimitris to ask about possible mitigation, counsel explained that in view of the record, knowing the statements which had been made and the discussions with the petitioner, and the psychiatric reports, they did not believe Dr. Dimitris or anyone else could be beneficial without some additional evidence which they did not have. (T. pp. 45,77). Counsel testified that the decision not to call Dr. Dimitris was a judgment call made at the time (T. p. 77).

Trial counsel testified that they were fully aware of the provisions of § 19.2-264.4 of the Code of Virginia (1950), as amended, and had discussed this with the petitioner. They tried to elicit petitioner's testimony, but he refused. (T. p. 82). Trial counsel attempted to elicit testimony from family members to no avail (T. p. 82). While counsel recognized that the psychiatric reports did not address mitigating mental abnormalities in those terms, they felt that without additional evidence none of the psychiatrists would be of assistance (T. pp. 82,83).

It is submitted that petitioner's attorneys exercised

reasonable judgment in this case. And even when hindsight reveals a mistake in that judgment, such does not render a lawyer negligent or lacking in competence in rendering his service. Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978). In this same vein, the Eighth Circuit said in Robinson v. United States, 448 F.2d 1255, 1256 (1970):

Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel.

The determination of whether an attorney rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. See Washington v. Estelle, 648 F.2d 276 (5th Cir.), cert. denied, ___U.S.____, 102 S.Ct. 402 (1981).

Petitioner argues that the range of competence must be higher in capital cases because of the qualitative difference between death and other penalties. This argument was rejected by the Virginia Courts, and has been rejected by the Fifth Circuit in Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981), cert. denied, ___U.S.____, 102 S.Ct. 2021 (1982). In rejecting the argument that a higher standard of representation must apply in capital cases, the Fifth Circuit stated:

Innumerable practical problems would be presented by such a holding. For example, since effective assistance is not judged by hindsight, the heightened standard would have to apply to all cases in which a capital offense was charged, regardless of whether the jury subsequently convicted the defendant of a non-capital offense or refused to impose the death penalty in a capital case. Recognition of a "sliding scale" for this constitutional standard would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path.
Id. at 1357, n. 18.

The petitioner refers to Washington v. Strickland, 673 F.2d 879 (1982), rehearing en banc granted, ___ F.2d ___ (5th Cir. May 14, 1982). When a case is reheard en banc, the panel opinion is stripped of any precedential value. United States v. Michael, 645 F.2d 252, 254 n.2 (5th Cir. 1981) (en banc), cert. denied, ___ U.S. ___, 102 S.Ct. 489 (1981).

Petitioner also asserts that the evidence presented at the capital sentencing phase of his trial was so meager and so bereft of any development or explanation as to be worthless. Petitioner points out that counsel did not obtain the detailed records of petitioner's prior hospitalizations but only introduced the summaries. Counsel has explained that they felt that the records they had obtained from the hospitals were sufficient and did not believe any further

records would be beneficial. Counsel also explained that they did not subpoena any of the psychiatrists because they felt that the best evidence was in the summaries and did not want to subject the psychiatrists to cross-examination. (T. pp. 71,72). It is strange indeed that petitioner would complain about the lack of the full reports not being introduced when he has completely failed to show in any way how such reports would have been beneficial. Petitioner's present counsel did not see fit to introduce such reports in the habeas hearing, and it must be assumed that they would not have been beneficial in any respect to petitioner. It is also noteworthy that in the habeas proceeding petitioner failed to produce one single piece of evidence to support his claim that he was under the influence of drugs or alcohol at the time of the offenses. Petitioner has also failed to produce any evidence that his family, girlfriend, or anyone else was available to provide mitigation for petitioner.

This case is simply not like the circumstances found in Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978). In Wood the court found counsel ineffective for the reason that he completely failed to explore an insanity defense when evidence was known to counsel which indicated such a defense. It is also apparent that Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), furnishes no support to petitioner. In Brennan the court concluded that counsel was ineffective in

failing to follow-up on a psychiatric opinion that the defendant was insane at the time of the crime. In the present case counsel secured two psychiatric reports, obtained records from petitioner's past hospitalizations, attempted to discover evidence to support the theory of alcohol or drugs, and attempted to obtain petitioner's family and others to testify on petitioner's behalf. The actions of counsel in this case are a far cry from the failures of counsel in Wood and Brennan. To characterize counsels' actions as failing to take the minimal steps necessary to explore, develop and prepare a case in mitigation is to ignore the facts.

In determining whether counsel is ineffective the fact that counsel erred is not alone sufficient to establish a denial of the Constitutional right. The Constitution does not guarantee representation which is infallible and an accused assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978).

The function of a defense attorney is to apply his professional judgment to an infinite variety of decisions in the development and prosecution of a case. Any determination that any given act or omission by counsel amounted to ineffective assistance must be viewed in light of the peculiar facts and

circumstances that influenced counsel's judgment. United States v. DeCoster, 624 F.2d 196, 203 (D.C. Cir. 1979).

Realistically, counsel develops his case in large part from information supplied by the defendant. In United States ex rel Green v. Rundle, 452 F.2d 232, 235 (3rd Cir. 1971), the court indicated that choices based upon such information should not later provide the basis for a claim of ineffectiveness even though that basis would have been undercut by inquiry of others.

Any "claimed deficiency must fall measurably below accepted standards. To be 'below average' is not enough, for that is self-evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." United States v. DeCoster, 624 F.2d at 215.

With the factual background of this case in mind it is appropriate to examine other cases which have examined the issue of ineffective assistance of counsel. In Dorsey v. State, 586 S.W.2d 810 (Ct. App. Mo. 1979), the defendant was addicted to drugs and undergoing methadone treatment at the time of his arrest. The defendant claimed that counsel was ineffective for not pursuing this defense. The court held that in the absence of some suggestion of mental instability there was no duty on counsel to initiate an investigation of the mental condition of the accused. It was alleged that counsel was ineffective for failing to consider an insanity

defense in Sanders v. Eyman, 600 F.2d 728 (9th Cir. 1977). The court rejected the claim and found that the record contained evidence that petitioner's post-arrest conduct was not the type that would raise any suspicions of his sanity or capacity. Additionally in Franklin v. United States, 589 F.2d 192 (5th Cir. 1979), cert. denied, 441 U.S. 950 the court rejected a claim that the attorney was ineffective for the failure to move for a competency exam when the record showed that the defendant was alert and coherent.

In this case counsel had reviewed the psychiatric reports and petitioner in his discussions with counsel had not given counsel any reason to suspect that petitioner was suffering from any mental deficiency at the time of the offenses. Ineffective assistance of counsel is to be gauged by the totality of the representation. An accused is not entitled to errorless counsel whose competence or adequacy is to be judged by hindsight. While the hindsight of post-trial counsel may perceive instances wherein trial counsel was not perfect and his strategy was not infallible, that is not the test applied when meeting such complaints. Sanchez v. State, 589 S.W.2d 422 (Cr. App. Tx. 1979); Earvin v. State, 582 S.W.2d 794 (Cr. App. Tx. 1979).

ARGUMENT II

THE TRIAL COURT PROPERLY RULED THAT PETITIONER WAS REQUIRED TO ESTABLISH PREJUDICE FROM ANY ACT OR OMISSIONS OF COUNSEL.

The petitioner maintains that the trial court committed error when it imposed upon him the burden of establishing prejudice from any act or omission of counsel. In support of his argument petitioner principally cites Holloway v. Arkansas, 435 U.S. 475 (1978); Gedders v. United States, 425 U.S. 80 (1976), and Herring v. New York, 422 U.S. 853 (1975). These cases are readily distinguishable from cases involving claims of ineffective assistance of counsel and provide no basis for petitioner's argument that he does not have to show prejudice.

Gedders was not based upon ineffectiveness but upon a Court ruling that prevented the accused from having actual assistance of counsel during a critical stage of his trial. Holloway, involved joint representation of multiple clients with conflicting interest, and in Herring a State statute gave the trial judge in a non-jury trial the power to deny defense counsel's closing summation. For a more exhaustive analysis of why these cases do not support petitioner's argument, See United States v. DeCoster, 624 F.2d 196, 201-202, 234-238 (D.C. Cir. 1979).

The rationale behind DeCoster is soundly based upon the very nature of collateral relief. In United States v. Frady, ___ U.S. ___, 102 S.Ct. 1584, 1593 (1982), this Court explained why in federal collateral proceedings the defendant must bear a greater burden of proof entirely:

"By adopting the same standard of review for §2255 motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal. Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgement commands respect." [Emphasis added].

The Frady court further explained:

"It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. [quoting] United States v. Addonizio, 442 U.S. 178, 184, 99 S.Ct. 2235, 2239, 60 L.Ed.2d 805 (1979) (footnotes omitted)."

* * *

"The burden of demonstrating that an erroneous instruction was so prejudicial

that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. [quoting] Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977)." [Emphasis supplied].

See, also, Chambers v. Maroney, 399 U.S. 42, at 53-54, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) (even if counsel was ineffective, an examination of the whole record reveals that the errors had no effect upon the outcome of the cause); Darcy v. Handy, 351 U.S. 454 (1956) (merely that counsel did not complete a list of things he could do does not establish error in the constitutional sense; the record reflects no actual prejudice).

In Darcy v. Handy, this Court explained the requirement that a defendant show actual prejudice:

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" [Emphasis added; citations omitted].

351 U.S. at 462.

This Court in Frady in fact explained that a habeas corpus petitioner has the burden to show actual prejudice

to the outcome of his cause from the error he asserts:

"Contrary to Frady's suggestion, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."
[Emphasis supplied by the Court].

102 S.Ct. at 1596.

The burden should normally lie upon the person pressing the claim. An exception may be made when the other party has sole access to the facts. As Justice Holmes noted in Casey v. United States, 276 U.S. 413, 418 (1928):

"It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government."

If the State were required to prove that defense counsel was adequate, there would be a strong motivation to oversee the decisions and activities of defense counsel in order to protect convictions. To do so would invariably place the prosecutor in the role of probing the confidential relationship between a criminal defendant and his attorney. See United States v. DeCoster, 624 F.2d 196, 227-229 (D.C. Cir. 1979). For these reasons the burden of establishing ineffective assistance of counsel has appropriately been placed upon the petitioner.

For cases placing the burden on petitioner to prove prejudice See United States v. Swinehart, 617 F.2d 336, 340

(3rd Cir. 1980); Parton v. Wyrick, 614 F.2d 154, 158 (8th Cir. 1980); Kibert v. Blankenship, 611 F.2d 520, 526 (4th Cir. 1979), cert. denied, 446 U.S. 911 (1980), reh. denied, 446 U.S. 993 (1980); Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. en banc 1978); Matthews v. United States, 518 F.2d 1245 (7th Cir. 1975); United States v. Baca, 451 F.2d 1112 (10th Cir. 1971).

Petitioner continues to rely upon Washington v. Strickland, 673 F.2d 879 (5th Cir. 1982). As previously pointed out, this case has been scheduled for rehearing en banc and consequently the opinion has no precedential value. See United States v. Michael, supra.

ARGUMENT III

THE PETITIONER DID NOT BEAR HIS BURDEN OF ESTABLISHING PREJUDICE.

Petitioner's argument hinges upon his assertion that by his counsel's failure to talk to Dr. Dimitris he has been deprived of available mitigating evidence. Even if it is assumed that counsel had some duty to call Dr. Dimitris, petitioner has failed to establish prejudice from any such

failure. Petitioner assumes that the report of Dr. Dimitris of July 14, 1980, raises a substantial issue of fact concerning the presence of mitigating mental abnormalities at the time of the offenses.

Respondent submits that petitioner's position cannot withstand scrutiny. Dr. Dimitris' opinion is essentially that if the facts of the case are as stated by petitioner to Investigator K. E. Collins on September 28, 1978, then he finds no mitigating mental abnormalities. If on the other hand the facts are those which petitioner presented in June, 1980, there would exist mitigating mental abnormalities due to reported heavy intoxication.

There can be no question about which statement of petitioner comprises the facts of this case. Shortly after the crimes petitioner gave several detailed statements describing his participation in the crimes. The voluntariness of these statements was contested during a motion to suppress at which time petitioner testified. Petitioner did not then and did not during the habeas hearing conducted on April 25, 1980, deny the truthfulness of the statements which he gave in 1978. The trial court has found that petitioner's statements in 1978 were voluntarily and intelligently given. The Supreme Court of Virginia has credited these 1978 statements as stating the facts. See Mason v. Commonwealth, 219 Va. at 1094. The petitioner never gave his counsel any reason to

believe he was at best "a hair's breath" distant from unconsciousness at the time of the offenses. (T. p. 77).

To the contrary, petitioner's explicit description is consistent with a person who is cold and calculating and is inconsistent with the actions of a person bordering on unconsciousness. (T. p. 77).

The physical facts found at the scene of the crimes corroborated petitioner's statements given in 1978. Petitioner said he went into the house of Mrs. Hand and told her to undress. Petitioner said she went into the bedroom to comply. Mrs. Hand's clothes were found in the bedroom. Petitioner stated that he had hit Mrs. Hand several times with an ax. An ax was found at the scene and laboratory examination revealed hair samples consistent with Mrs. Hand's hair. Petitioner stated he had introduced the ax into Mrs. Hand's rectum. The physical examination showed her anus opening was dilated and slightly patulous. Petitioner stated he started the fire under the chair and the arson examiner confirmed this to be the point of origin of the fire. Most importantly petitioner stated he set the house on fire to keep down the evidence. (T. 9/28/78 p. 59), and that he went back into the burning house to recover a bag which he believe contained his fingerprints. (T. 9/28/78 pp. 64, 65). In this regard a portion of Dr. Lee's testimony is pertinent:

"For example, I recall a statement where he had access to traveler's checks where he was looking for money. It just doesn't register that a person who is mentally upset and doing hideous things would discriminate against taking traveler's checks because they looked like money." (T. p. 115).

Such actions as these are entirely inconsistent with a person bordering upon unconsciousness.

It is further to be noted and of importance that part of Dr. Dimitris' opinion expressed in his letter of July 14, 1980, is based upon petitioner's uncorroborated self-serving statements of his ingestion of drugs and alcohol. When petitioner was examined by Dr. Dimitris in 1978 he specifically advised Dr. Dimitris that at the time of the offenses he was having no problem with drugs or alcohol. (T. pp. 21, 26). Conveniently, however, in 1980 the petitioner has decided that he had a problem with drugs and alcohol at the time of the offenses. Dr. Lee testified that had the attorneys called him he would have told them that in light of his test findings and petitioner's statements they would have to develop considerable independent confirming evidence that petitioner was not in possession of adequate judgment to appreciate the nature of his acts. (T. p. 99). The record establishes without contradiction that although counsel tried to find corroboration they were unsuccessful.

Petitioner argues that the responsibility for determining which of Dr. Dimitris' opinions is correct would have rested on the fact finder. Respondent submits that the

habeas court had the responsibility to make such judgment. In Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978), the court held that the district court in a federal habeas corpus proceeding had the responsibility of determining whether there existed a substantial question of criminal responsibility. The factual scenario in Proffitt is similar to the claim being made in the present case.

From the facts in this case it can only be concluded that the statements given by petitioner to Investigator K. E. Collins on September 28, 1978, are true, accurate and are the facts of this case. There is no question, substantial or otherwise, about the existence of mitigating mental abnormalities. Dr. Dimitris' opinion firmly concludes that petitioner was not suffering from any mitigating mental abnormalities at the time of his crimes based upon the statements he made in 1978. This being so, petitioner has failed to carry his burden of establishing prejudice from any omission by counsel.

For the reasons previously set out there can be only one factual circumstance in this case and that arises from petitioner's statements in 1978. On these facts no court could or would hold that petitioner was suffering from any mitigating mental abnormalities at the time of his offenses, and any failure to have petitioner examined is harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth, respondent asserts that the Petition for Habeas Corpus was properly denied, the Court's finding that petitioner received effective assistance of counsel is clearly supported by the record, and the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, James E. Kulp, a member of the bar of this Court, do certify that on August 19, 1982, I caused this Brief In Opposition to be deposited in a United States Post Office or mailbox, first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2.

I further certify that a copy of this Brief In Opposition was mailed, first class postage prepaid, to F. Guthrie Gordon, III, 409 Park Street, Charlottesville, Virginia 22901, counsel for petitioner.

James E. Kulp

James E. Kulp
Senior Assistant Attorney General

VIRGINIA

CITY OF RICHMOND, to-wit:

The foregoing instrument was subscribed and sworn before me on this 19th day of August, 1982, by James E. Kulp.

Janet J. Johnson

Notary Public

My commission expires: My Commission Expires October 4, 1982

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